STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
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CROWN CASTLE NG EAST LLC,

Plaintiff,

COMPLAINT

-against-

DOCKET NO.______

THE CITY OF RYE, and THE CITY COUNCIL OF THE CITY OF RYE

Defendants.

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Plaintiff Crown Castle NG East LLC ("Crown Castle"), by its attorneys Cuddy & Feder LLP, as and for its Complaint against Defendant The City of Rye ("Rye" or the "City") and The City Council of the City of Rye ("City Council") (Rye and City Council, collectively, "Defendants"), respectfully alleges as follows:

Facts Common To All Counts

Nature Of The Action

1. This action arises from the City's improper refusal to grant Crown Castle access to public rights of way in Rye for Crown Castle to expand an existing network of small cells, or a distributed antenna system ("DAS"), despite Crown Castle placating the City by responding to repeated requests for legally irrelevant information and providing the City with three alternative plans for this expansion, over the course of a year and a half review process. The DAS system, which has now been blocked by the City's tactics, would provide enhanced personal wireless services to those living, working and traveling through Rye and to those who depend upon such services for operation of their smartphones, tablets and other mobile devices.

2. Crown Castle is a facilities based provider that maintains a Certificate of

Public Convenience and Necessity ("CPCN") issued by the New York State Public Service Commission ("NYS PSC"). Crown Castle's status authorizes it to provide its services by deploying telecommunications facilities in public rights of way (referenced herein as "ROW").

3. Crown Castle designs, installs and operates DAS systems throughout the United States. Those systems are used by Federal Communications Commission ("FCC") licensed companies (Crown Castle's carrier customers) to provide wireless services to the public. Increasingly, members of the public rely exclusively on commercial wireless services for their business and personal needs, including for access to E911 in an emergency.

4. Crown Castle's development of DAS and small cell systems advances federal public policy "to make available so far as possible, to all people of the United States . . . a rapid, efficient, nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication." 47 U.S.C. § 151.

5. The City's actions thwart federal policy and laws by unreasonably discriminating against Crown Castle, compared to other utility providers in the ROW, and by effectively prohibiting Crown Castle from providing telecommunications services. The City's actions violate, *inter alia*, the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Telecommunications Act," the "Communications Act," the "Act" or the "TCA"), including §§ 253 and 704 (codified at 47 U.S.C. § 332(c)(7)(B)).

6. The City's actions blocking Crown Castle's rights to access the ROW also violate New York state law, as well as a consent resolution adopted by the City on January 12, 2011 (the "Consent Resolution"), and a February 17, 2011 Right of Way Use agreement between Crown Castle and the City (the "RUA").

7. From 2011 to 2015, Crown Castle deployed nine small cells in Rye as part of its DAS system (the "Initial Installations") where an approved antenna and equipment shroud were placed on poles owned by Consolidated Edison, Inc. ("Con Ed") and linked to aerial fiber and power connections pursuant to Crown Castle's pole attachment agreement with Con Ed.

8. These Initial Installations were deployed pursuant to federal, state, county and local law. Pursuant to the RUA, Crown Castle (through its predecessor in interest) obtained the necessary permits after review by Rye's City Engineer – the official designated to conduct the review under City Code Chapter 167 (which governs utility installations in the public ROW.)

9. Crown Castle's Initial Installations operated in the City without complaint (to Crown Castle's knowledge) from the City Council or public for several years.

10. In 2015, Crown Castle sought an interpretation of the RUA as part of a planned expansion of the DAS network to serve several areas of Rye with historically poor wireless services. In response, the City forced Crown Castle, over its objection, to participate in an overly lengthy, legally inapplicable, ad-hoc discretionary process before the City Council.

11. This process violated state law, the City's prior Consent Resolution, and the RUA – which expressly requires that Crown Castle's small cells be reviewed through the administrative process agreed to in 2011. Under the RUA, that review process had to be consistent with review processes applied to other utility infrastructure providers in the ROW, such as electric, fiber and cable companies who install equipment pursuant to City Code or by franchise agreement.

12. For over a year, the City delayed, forcing Crown Castle through multiple, inapplicable, unnecessary areas of inquiry, including asserting false claims of breaches of the RUA and subjecting Crown Castle to public hearings and review processes, none of which were rooted in the City's applicable Code, and all in response to Crown Castle's request to be granted a permit

for Crown Castle to expand its DAS system in the ROW, which Crown Castle has a right to access under federal law and as a CPCN holder on reasonable terms and conditions.

13. The City's make-it-up-as-you-go public referendum on this "wireless" infrastructure proposal culminated with the City Council's issuance of an untimely, unsupported "Positive Declaration" resolution under the New York State Environmental Quality Review Act ("SEQRA") on April 19, 2017 (the "SEQRA Determination").

14. A few days later, the City bootstrapped the SEQRA Determination to a Saturday April 22, 2017 denial of Crown Castle's request for an interpretation or amendment of the RUA and application for a permit for Crown's DAS expansion (the "Denial"). The Denial, in violation of state and federal law, rejected three different alternatives for the DAS expansion.

15. In issuing the Denial, the City Council bowed to pressure from a small, but highly vocal group of citizens (the "Citizens Group") that frequently challenged the politics of certain City Council members, made wild accusations unsupported by evidence, and was aided by anti-wireless advocates and supported by some Council members.

16. The pressure was so intense that under the threat of litigation from the Citizen's Group, the City retained special counsel in the midst of the proceeding to find a way to deny Crown's requests and prohibit the DAS expansion in the City.

17. The Citizen's Group's pressure was unrelenting, and it led to repeated bad acts by the City. Indeed, the City breached several tolling agreements executed by the parties in repeated efforts to efficiently conclude the City Council proceeding. Additionally, the City issued a last-minute staff report and withheld evidence until the very end of the proceeding to the prejudice of Crown Castle. Finally, the City issued its SEQRA Determination and Denial, resolutions which completely ignore unrefuted evidence submitted by Crown Castle.

18. The SEQRA Determination and Denial present a series of findings and arguments mischaracterizing the record and distorting and going beyond the boundaries of any legitimate, lawful authority. For example, the Denial purports to impose on Crown Castle the burden of proving that the proposed expansion of its DAS network would meet the legal test for a prohibition of wireless services claim which was established by the Second Circuit Court of Appeals for evaluating claims under Section 332(c)(7) of the Communications Act.

19. Even though Crown Castle's application carries that burden, the test should not apply. Pursuant to the Consent Resolution, RUA, and Crown Castle's rights under federal and state law, the scope of the City's review should have been limited to the administrative review process applied to other utility providers who mount equipment on ROW poles in Rye and to the permit issuing criteria in the RUA.

20. The City Council ignored its contractual obligations and prior Consent Resolution (which was issued in furtherance of the New York Transportation Corporations Law allowing for deployment of utility infrastructure in rights of way) and instead tried to claim it had unfettered legislative, proprietary authority to illegally subject Crown Castle's request for a permit to inapplicable provisions of the City's special Code Chapter regulating wireless facilities (which by application would prohibit ROW infrastructure deployment) as well as to requirements imposed by the City having nothing to do with legitimate land use or public safety concerns.

21. The City also employed its own illegal tactic of serving Crown Castle with notice of purported and baseless "defaults" under the RUA in an effort to prematurely terminate Crown Castle's rights under the RUA.

22. But for that attempted termination, the RUA would have a term of 10 years, expiring in 2021 (with three five-year extension options), and would (and should) continue to

govern, and appropriately address, the manner in which the City's review of deployment requests is conducted under federal and state laws.

23. The City's efforts to strip Crown Castle of its contractual rights are designed so the City can roll the clock back to 2011 and start over with a new consent proceeding, while the City also has efforts underway at enacting a prohibitory Code provision directly applicable to infrastructure in the ROW designed to bar entry of Crown Castle's DAS network.

24. Crown Castle thus seeks relief under federal law, including a declaration that: (1) the City's actions violate §§ 253 and 332 of the Communications Act by barring access to public ROW in Rye for telecommunications services; (2) the City's process in regulating Crown's expansion of its DAS system in Rye was effectively a prohibition and unreasonably discriminatory in that it treated Crown Castle differently than other utility providers (including the City's unregulated permission for cable WiFi deployments throughout Rye); and (3) the City's SEQRA Determination and Denial are not supported by substantial evidence.

25. Crown Castle also is entitled to a reversal of the City's SEQRA Determination and Denial under state law, including New York State Transportation Corporations Law § 27 and Crown's CPCN, which provide Crown Castle's rights (irrespective of the RUA) to use rights of way for infrastructure deployment on consent on reasonable terms and conditions for access to the ROW within the City and that routine utility infrastructure and antenna attachments are exempt from SEQRA review.

26. Crown Castle additionally seeks redress for the City's breach of contract and the City's violation of the implied covenant of good faith and fair dealing by virtue of both the City's imposition of requirements beyond what is contemplated by the RUA, and the City's bad-faith and baseless attempt to curtail and/or terminate Crown Castle's rights under the RUA. Crown

Castle also seeks a declaration that it was not in breach of the RUA (or alternatively, that any alleged breach has been cured) and that the RUA remains in full force and effect.

27. Crown Castle is also entitled to a reversal of the Denial under federal and state law, as well as to injunctive relief requiring the City to immediately issue all required and necessary permits to install, deploy and operate the proposed DAS system.

28. Crown Castle respectfully asks this Court to prioritize the timely disposition of this case to the extent of Crown Castle's request for injunctive relief to mandate the approval of the DAS system's deployment, in accordance with 47 U.S.C. § 332(c)(7)(B)(v), directing that "the court shall hear and decide" Crown Castle's claims "on an expedited basis."

The Parties

29. Plaintiff Crown Castle is a corporation organized under the laws of the state of Delaware, with a primary address at 2000 Corporate Drive, Canonsburg, Pennsylvania. Crown Castle (through its predecessor in interest) has been granted a CPCN, Case No. 03-C-0027 (April 4, 2003), by the Public Service Commission of the State of New York in order to offer its services to its customers in the State. Crown Castle constructs and deploys facilities for the provision of telecommunications services and/or personal wireless services to the public as those terms are used and defined in §§ 253 and 332 of the Communications Act. Crown Castle is the successor to NextG Networks of NY, Inc. (also referred to herein as "NextG"), including with respect to NextG's rights under the RUA.

30. Defendant City is a municipal corporation of the State of New York, located at City Hall, 1051 Boston Post Road, Rye, New York.

31. Defendant City Council of the City of Rye is the municipal agency ultimately responsible for the management of City owned rights-of-way, authorized to issue City

consent to use of public rights of way as a matter of state law and with authority to enter into municipal franchise agreements related to use of City owned structures in public rights of way.

Jurisdiction And Venue

32. This Court has subject matter jurisdiction over this action pursuant to: (a) 47 U.S.C. §§ 253 and 332(c)(7)(B) of the Communications Act because Crown Castle has been adversely affected and aggrieved by Defendants' actions in violation of these provisions of the Communications Act; and (b) 28 USC § 1331 because this is a civil action that presents federal questions arising under the Communications Act.

33. This Court has personal jurisdiction over Defendants, who reside in this District, and venue is proper in this Court in that the parties agreed to submit to the jurisdiction of this District, and because this is the District where Defendants reside.

34. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the claims stated herein arose in the judicial district for the United States District Court, Southern District of New York, and Defendants reside in this District.

The Important Federal Interests At Issue In This Case
And Crown Castle's Provision Of Services In Furtherance Thereof

35. Congress has declared that there is a public need for wireless communication services such as "personal wireless services," as set forth in the Communications Act, and the FCC rules, regulations and orders promulgated pursuant thereto.

36. Congress intended the Communications Act to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans." H.R. Rep. No. 104-458, at 206 (1996) (Conf. Rep.); *see also* 1996 U.S. Code Cong. and Adm. News, p. 10.

37. In regulating the provision of wireless services to the public, the FCC licenses providers of wireless services to use limited resources, frequencies and spectrum allocated by the FCC for the provision of such services to the public.

38. While the Communications Act preserves state and local authority over the placement, construction or modification of wireless facilities, it also expressly preempts any state or local government rule or regulation that effectively prohibits the provision of wireless services and from implementing any decisions that are not supported by substantial evidence.

39. Specifically, § 253 of the Communications Act prohibits local entities from erecting barriers that prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services. The prohibitions applies to acting and to declining to act, in such a manner so as to result in unreasonable delay in the deployment of the provider's facilities and provision of telecommunications services. *See* 47 U.S.C. § 253(a).

40. Further, § 253(c) limits local authorities' power to "manage" carriers' use of public rights of way, requiring that any actions be made on a competitively neutral and non-discriminatory basis, such as through the imposition of time, place and manner restrictions.

41. In furtherance of national policy to expedite wireless deployment, in its 2009 "Shot Clock Order," the FCC defined specific "reasonable" timeframes within which state and local governments must act on wireless siting applications.

42. The FCC recognized: "personal wireless service providers have often faced lengthy and unreasonable delays in the consideration of their facility siting applications, and that the persistence of such delays is impeding the deployment of advanced and emergency services." *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All*

Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling, 24 FCC Rcd. 13994 ¶ 32 (Nov. 18, 2009) (Shot Clock Order "promotes the deployment of broadband and other wireless services by reducing delays in the construction and improvement of wireless networks") ("Shot Clock Order").

43. The Shot Clock Order states that a "reasonable period of time" under the Communications Act is presumptively "90 days to process personal wireless service facility siting applications requesting collocations, and, also, presumptively, 150 days to process all other applications. Accordingly, if State or local governments do not act upon applications within those timeframes, then a 'failure to act' has occurred and personal wireless service providers may seek redress in a court of competent jurisdiction . . . ."

44. The Communications Act also preempts local governments from regulating technological preferences that have the effect of prohibiting the provision of wireless services.

45. Crown Castle provides "telecommunications service" as that term is defined by the Communications Act, 47 U.S.C. § 153(53).

46. Crown Castle's telecommunications service consists of transporting Crown Castle's customers' communications (voice and data) over fiber optic lines between points designated by the customer without altering the content of the communications. In this case, the communications are to be transmitted over the proposed expanded DAS network.

47. Crown Castle's current and potential customers in Rye are retail providers of wireless telecommunications services (also known as Commercial Mobile Radio Services) providers, cellular, or Personal Communications Services providers such as the carrier customer seeking to expand its services in Rye and use Crown Castle's expanded DAS network.

48. Crown Castle's typical telecommunications service offering involves a

communication signal handed off from Crown Castle's customer, which Crown Castle then transports over its fiber optic facilities. This handoff and transport takes place through equipment configurations called "nodes" that are located on utility or streetlight poles in the rights of way.

49. The typical nodes in Crown Castle's network consist of electronic equipment that converts radio frequency ("RF" or wireless) format communications to light signals carried over Crown Castle's fiber optic lines.

50. Nodes in Crown Castle's network include a small, low-power antenna, laser and amplifier equipment to convert RF signals to optical signals (and vice versa, *i.e.*, from optical to RF), that is connected to the antenna, fiber optic lines, and associated equipment such as power supplies, which are operated, controlled, managed and/or maintained by Crown Castle.

51. Upon handoff from its customer at a node, Crown Castle transports communications through Crown Castle's fiber optic network to a distant point that is typically, but not always, an aggregation point for Crown Castle's communications called a "Base Station."

52. The Base Station is usually a facility of Crown Castle's customer that is a central location containing such equipment as routers, switches and signal conversion equipment.

53. Crown Castle hands the communication signal back to its customer at the Base Station, where the communications signal may be interconnected with the public switched telephone network.

54. All wireless RF transmissions are performed by Crown Castle's customers, who control and are responsible for their licensed, proprietary radio frequency spectrum.

55. Crown Castle's DAS network is used by Crown Castle's customers to facilitate Crown Castle's customers' provision of personal wireless services. Crown Castle's nodes constitute Personal Wireless Service Facilities as defined in § 332(c)(7) of the Act.

56. Crown Castle's existing and proposed service in the City is a facilities-based telephone service and telecommunications service.

57. The end users of these services (the general public) communicate through handsets, mobile telephones, and other media via a network of wireless service facilities such as those Crown Castle seeks to deploy here, each of which operate at low wattages and use the finite amount of the radio frequency spectrum allotted by the FCC.

58. Pursuant to federal mandates, telecommunications facilities are part of the nation's important infrastructure and further a national policy to extend wireless services to all areas of America and to provide broadband services, which by virtue of emerging technology and increasing demand includes the DAS facilities at issue here. These federal mandates are evidenced in numerous laws adopted by the Congress, FCC regulations and federal court decisions.

Years After A Cooperative Review Process Relating To Crown Castle's Initial Installations, Crown Castle's Application To Expand Its DAS Network Encounters Manufactured Roadblocks

59. While as a holder of a CPCN, Crown Castle has independent rights under New York State Law, including New York State Transportation Corporations Law § 27, to deploy its infrastructure in rights of way on reasonable terms and conditions for such access, the City's explicit consent to use Rye's streets under New York state law in furtherance of those rights was originally granted to Crown Castle by the 2011 Consent Resolution.

60. At that time, the City also approved execution of the RUA.

61. In the RUA, the City expressly memorialized, affirmed and promised to honor Crown Castle's rights as holder of a CPCN and under New York law to be granted access to the public ROW (independently of the RUA Crown Castle has those rights under state and federal) in the same manner and on the same terms applicable to other certificated telecommunications providers and utilities, while also granting Crown Castle a franchise to install

equipment on municipal owned structures in the ROW.

62. Following issuance of the Consent Resolution and execution of the RUA, Crown Castle installed nine nodes on Con Ed utility poles, with the City's approval.

63. When it approved these Initial Installations, the City did not require Crown Castle to seek permits under the City's wireless or zoning code chapters or based on any criteria outside of the four corners of the RUA. Instead, the City employed a streamlined administrative permitting process, which was handled by the City Engineer, and which was similar in scope to the routine review employed for other utilities from time to time in Rye.

64. Such review was consistent with the permitting process set forth in the RUA and Crown Castle's rights independent of the RUA under the New York State Transportation Corporations Law and as a holder of a CPCN.

65. The RUA grants the City the right to conduct reasonable prior review of Crown's installations and impose upon Crown Castle the obligation to obtain any required permits for that review.

66. The RUA also contains an express restriction against the City requiring any zoning or other permits unless the zoning and permits are also required for other types of telecommunications providers, such as cable providers (which also provide unregulated pubic WiFi access to its customers through utility pole-mounts and use a WiFi system with the same radio signal technology as DAS) and Incumbent Local Exchange Carriers ("ILECs") (local landline phone companies which provided service prior to the Communications Act).

67. Specifically, § 3 of the RUA prohibits the City from forcing Crown Castle through an elongated discretionary review process when such process is not applied to similarly situated utility providers that also mount infrastructure on poles in the ROW. According to the

RUA:

> Any work performed pursuant to the rights granted under this Use Agreement shall be subject to the reasonable prior review and approval of the City except that it is agreed that no zoning or planning board permit, variance, conditional use permit or site plan permit, or the equivalent under the City's ordinances, codes or laws, shall be required for the installation of [Crown Castle's predecessor] NextG's Equipment installed in the Public Way and/or on Municipal Facilities, unless such a process has been required for the placement of all communications facilities and equipment in the Public Way by all other telecommunications providers, including but not limited to the ILEC and local cable provider(s).

68. For nodes to be installed on existing poles, § 5.1 of the RUA requires only that Crown Castle provide a list of proposed pole attachment locations prior to deployments, and grants a thirty day default approval period with respect to such locations. That Section also provides that Crown Castle may be subjected to a permitting review process and charged permit fees, "so long as the permit fees and process that the City requests of NextG are functionally equivalent to the fees and the process that are applied to the ILEC and/or the cable provider(s)."

69. This provision is equivalent to Crown Castle's rights under federal law and as a CPCN holder to access the ROW within the City on reasonable terms and conditions.

70. To the extent any other user of the City's streets (local landline companies, cable companies deploying cable boxes and WiFi transmitters, electric company, etc.) can install equipment without zoning or other discretionary review, Crown Castle is legally entitled to the same treatment and same application process (in this case, the issuance of a ministerial, non-proprietary administrative permit). Any other requirements subject Crown Castle to illegal unreasonable discrimination as compared to other providers of utilities in the ROW.

71. The City evinced its understanding of the RUA's application in this way by previously allowing for the Initial Installations of Crown's nine DAS nodes since 2011 without having required Crown to go through any discretionary review process.

72. The RUA's incorporation of federal and state legal standards related to the use and permit process for installation in the ROW (and protection against discriminatory or prohibitory permit processes) is also consistent with Crown Castle's rights under New York State Transportation Corporations Law § 27, which provides that any provider "may erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways and may erect, construct and maintain its necessary stations, plants, equipment or lines upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same . . . ."

73. In the fall of 2015, Crown Castle advised the City of its intent to deploy additional node sites throughout the City and provided the City with a list of locations and the new node specifications planned for use.

74. Based on its previous experience in the Initial Installations and because the initial node specifications were substantially similar to examples of authorized equipment listed in Exhibit A to the RUA Crown expected all that was needed to proceed with the installations was City Manager/City Engineer approval.

75. However, the City changed its approach for the planned DAS expansion and embarked on a series of interpretations and actions that violated the spirit and the letter of the RUA, and Crown Castle's independent rights to deploy in the ROW under federal and state law.

76. In connection with Crown Castle's plans, which initially sought to install approximately 85 new nodes, Crown Castle sought an interpretation of the RUA which would permit the installation of a larger equipment shroud (the pole-mounted box that houses equipment) than what was shown in the examples of approved Equipment contained in Exhibit A to the RUA.

77. Representatives from Crown Castle and the City met on March 15, 2016 to

discuss Crown Castle's proposal. As part of those discussions, the parties considered the possibility of Crown Castle seeking a simple amendment to the RUA to ensure that the specifications for the slightly larger equipment shroud would be permitted under the RUA, as well as to discuss plans which Crown Castle intended to present at an April 13th City Council meeting.

78. Crown Castle did not necessarily agree that an RUA amendment would be required for this larger equipment shroud, because it was Crown Castle's position that the definition of "Equipment" in the RUA, coupled with Exhibit A to the RUA illustrating the types of Equipment that was approved would allow for the installations at the size Crown Castle was contemplating. However, City officials advised that the larger shroud initially contemplated as part of Crown Castle's design would require an amendment to the RUA to add additional node specifications to Exhibit A to the RUA (which lists examples of equipment to be installed and was not meant to be all-inclusive) and approval of the amendment by the City Council.

79. Additionally, in a departure from prior practice relating to permitting of Crown Castle's previously installed nodes, as well as practices relating to other utility providers in the ROW, Crown Castle was advised that the City Council would be exercising jurisdiction to review and approve the node plan and details, disregarding the City's past precedent in the manner in which it handled the Initial Installations as well as the manner in which other utility providers' installations in the right of way were reviewed (if at all) and approved.

80. The imposition of permit requirements on Crown Castle that exceeded the requirements imposed on others attaching equipment to poles in the ROW (such as cable companies, which, on information and belief, have similar or larger sized shrouds that are not similarly regulated by the City) violated Crown Castle's rights under state law and the RUA, as well as Crown Castle's right to be free from unreasonable discrimination and effectively

prohibitory regulatory regimes under federal telecommunications law.

81. The City's decision to impose more onerous, discretionary review requirements on Crown Castle was an early step in the City's deliberate process to bar Crown Castle's ability to provide wireless services through DAS infrastructure in violation of § 253 of the Communications Act.

82. Crown Castle reserved all rights following its initial discussions with City officials about its new node plan, noting that City Council approval never was required previously for Crown Castle's existing nodes in the City. Crown Castle also was never required to obtain a permit, and to Crown Castle's knowledge, no utility installations required permits, except in cases of excavation permits that had been sought and granted in the past.

83. By letter dated April 8, 2016 to the City Council, Crown Castle confirmed its intent to install new nodes in Rye, as per Crown Castle's contract with its carrier customer.

84. Crown Castle also formally asked the City Council to interpret (or, if the City thought it necessary, to amend) the RUA so as to explicitly permit the proposed larger equipment shroud design as part of Crown Castle's installations in the City.

85. Although the RUA, consistent with state and federal law, made the need for full City Council discretionary review unnecessary, the City Council nevertheless asserted permitting jurisdiction over the design, placement, and location of all the nodes planned as part of Crown Castle's DAS expansion.

86. In another departure from prior practice and from the review processes conducted for other utility providers in the ROW, the City also referred the matter to the City's Board of Architectural Review ("BAR") which, in May 2016, approved the larger shroud design as part of the BAR's advisory role to the City Council. The BAR also approved Crown Castle's

revised 73 node installations. (Crown Castle reduced the number of nodes it sought to install from 85.)

87. By June of 2016, external pressures from the Citizens Group began to mount. That pressure first boiled over when Crown Castle received a June 14, 2016 petition purporting to appeal the BAR's approval of Crown Castle's plans. The petition included a request that other City agencies, including the Zoning Board of Appeals and Planning Commission, review Crown Castle's plans.

88. Crown Castle, alarmed at this interference, advised the City of its concerns and reminded the City of the various contractual and statutory obligations under the RUA and the state and federal laws at play.

89. More specifically, in a June 17, 2016, letter, counsel for Crown Castle reminded the City that: (a) as a holder of a CPCN, Crown Castle is a telephone corporation with legal authority to deploy nodes on utility poles in municipal ROWs for telecommunications purposes (and this is the case whether the RUA is in effect or not); (b) under New York's Transportation Corporations Law § 27, Crown Castle had the right to "erect, construct and maintain the necessary fixtures . . . over or under any of the public road, streets and highways"; (c) while § 253 of the Communications Act allows municipalities management authority over public ROWs, it does not allow for the City to employ a discretionary review process or its regulatory zoning authority (*e.g.*, requiring public hearings before the Planning Commission which could apply to wireless facilities, such as towers, outside of a ROW) for utility pole attachments; (d) Chapter 167-5 of the City's ROW regulations (which Chapter governs streets and sidewalks, not zoning regulations) could potentially apply (again, assuming that the City applied that Chapter to other ROW utility providers), and such regulations require the City Council to grant consent for

telephone corporations to install poles, wire attachments and the like; (e) consistent with the City's laws, City consent for utility pole attachments throughout Rye was already granted by the Consent Resolution and under the RUA back in 2011; (f) the consent sought by Crown Castle for the Initial Installations was pursuant to that RUA, as well as Crown Castle's rights under federal law and as a CPCN holder independent of the RUA; (g) the BAR determination (although unnecessary) was not objectionable in furtherance of a general referral, but that referral did not evidence a determination under Chapter 196 of the City's Code, governing wireless zoning, which Chapter is not relevant to telecommunications infrastructure in the ROW; (h) the City Council's holding of a public hearing related to Crown Castle's request for a permit was not legally required by Chapter 167 (the City's sidewalks and streets law), the City's ROW regulations or the RUA, and in that respect, the City had already exceeded the permissible scope of its review; (i) §§ 3 and 5 of the RUA confirm that Crown Castle's ROW deployments are not subject to the City's zoning or other land use discretionary permitting requirements (such as Chapter 196 governing wireless zoning review outside the ROW); and (j) the language of Chapter 196 itself confirms that it applies to wireless facilities which are not mounted on utility poles in the City ROW, and which are regulated separately by Chapter 167 of the City's Code.

90. In its June 17, 2016 correspondence, Crown Castle also took issue with the petition filed by the Citizens Group which pressed for other agencies to take up the review process, again reminding the City that its review of Crown Castle's request to install additional nodes had already gone above and beyond compliance with the City's review standards under the RUA and its Code, and that the City's decision to obtain a BAR advisory opinion and to hold a public hearing went beyond anything legally required under the RUA or as part of the City municipal management process under Chapter 167 of its Code.

91. Crown Castle also explained that the petition did not raise any issue requiring additional measures by the City. It noted that the petition did not make clear any specific concern or objection, that the BAR did not take any action that would be appealable to the Zoning Board of Appeals, and the BAR's communication was instead a non-appealable advisory opinion.

92. The June 17th letter also confirmed that: (1) no notice or special permit under Chapter 196 was required from the City Council because the project did not fit within that Chapter's definition of a wireless facility; (2) the Planning Commission had no site plan jurisdiction over projects in the City ROW because the RUA governed; and (3) Crown Castle's pole attachments did not fall within the purview of Chapter 196 because that provision was addressed to such wireless facilities as towers.

93. The June 17th letter also placed the City on notice that should the City subject Crown Castle to the discretionary zoning review actions advocated by the petition, the City would be in breach of the RUA, be acting beyond its jurisdiction over pole attachments in the ROW (under the RUA, in addition to Crown Castle's rights as a CPCN holder under the New York State Transportation Corporations Law and under § 253 of the Communications Act) and that the City would be in violation of federal and state law.

94. Crown Castle ended its June 17th letter with a request that the City issue a permit at its planned July 13, 2016 City Council meeting, noting that the added node specifications had been approved by Con Ed as permitted attachments and that there were no known traffic or pedestrian safety considerations associated with the planned utility pole attachments.

95. Crown Castle's requests that the City honor Crown Castle's rights to deploy its infrastructure pursuant to the RUA, federal law, state law and the applicable provisions of the City's Code (such as the Streets and Sidewalks Law – Chapter 167, to the extent same were applied

to other ROW utility providers) were rejected.

96. The City then put Crown Castle through multiple facets of public review, illegally asserting further discretionary authority and proprietary rights to impose requirements that violated Crown Castle's rights to deploy equipment in the ROW as a CPCN holder, and under § 253 of the Communications Act, as memorialized in the RUA.

97. For example, the City subjected Crown Castle's permit request to review under SEQRA – a process that can lead to indefinite delays in the course of review.

98. Crown Castle tried to preempt any perceived SEQRA issues. By letter dated June 24, 2016 to the City's Corporation Counsel, Crown Castle reminded the City that its request was for administrative permits to be approved by the City Manager/City Engineer in accordance with §§ 3 and 5 of the RUA that the City Council approved in 2011.

99. Crown Castle also recognized the appropriate role of the City Engineer in reviewing Crown Castle's request (*e.g.*, with respect to addressing any potential safety issues) solely to the extent other similarly situated telecommunications and utility companies which use utility poles – like Altice, Cablevision, fiber companies and Con Ed – are subject to such review.

100. Crown Castle also made clear in that June 24th letter that mounting equipment on utility poles – in similar fashion to other similarly situated telecommunications and utility companies – are Type II actions for SEQRA purposes. A Type II action is one found categorically to not have significant adverse impacts on the environment, such that there is no requirement for an Environmental Assessment form, a negative or positive declaration, or an Environmental Impact Statement. For support of the Type II classification, Crown Castle referred the City to 6 NYCRR 617.5(c)(11), (19) and (7) and to the NYS Department of Environmental Conservation ("DEC") SEQRA Handbook.

101. The June 24th letter also advised that the City that the City Council's review involved matters exempt as Type II under 6 NYCRR 617.5(c)(19), (26) and/or (31) as related to interpreting the RUA on the new equipment box specification because the proposed equipment substantially conformed to the specifications which were examples of approved equipment on Exhibit A to the RUA.

102. Crown Castle also took the alternative (and preemptive) step in its June 24th letter of furnishing the City with a Short Environmental Assessment Form, despite its position that any environmental impact statement could not reasonably be required under SEQRA, in anticipation of the event that someone might procedurally argue that City Council action is an "unlisted" action for SEQRA purposes.

103. The June 24th letter also reminded the City that the project was limited to equipment attached to utility poles in the ROW with no visual impacts different in degree or kind than existing installations such as Con Ed transformers, Cablevision boxes, wires and WiFi nodes (which nodes use the same basic radio frequencies used by wireless carriers and which the City had not regulated at all), and other routinely installed equipment in the City. As such, Crown Castle advised that even if Crown Castle's permit request were not Type II, a negative declaration would be required under SEQRA, such that any SEQRA review could, and should, end there.

104. Crown Castle concluded its June 24th letter by requesting that Corporation Counsel advise the City accordingly so that at the July 13th City Council meeting, any SEQRA issue raised could be properly disposed of and the process could move forward.

105. In the days preceding the July 13th City Council meeting, an anti-Crown Castle application flier was circulated through the community. That flier began with the phrase: "Dear Rye Neighbor: A Mini Cell Tower is slated to be located on a telephone pole on your

property or adjacent to it."

106. In addition to falsely characterizing a single node as a "Cell Tower," the flier asserted (without supporting data) alleged adverse property value impact: "locating a Mini Cell Tower near a home may be effectively robbing the homeowner of value in his or her home and transferring that value to Crown Castle" and its carrier customer. This, notwithstanding that the proposed equipment would be visually indistinguishable to a layperson from existing pole-mounted equipment (this claim was also later rebutted by a certified appraiser who confirmed in the record that there would be no adverse property impact).

107. Crown Castle, while reserving its objections, tried to move forward with the review process imposed by the City.

108. On July 29, 2016, as a follow-up to requests made by a Rye City Council Member, Emily Hurd, Crown Castle forwarded additional information to the City and noted that Crown Castle was unaware at that point of any other information required from the City in order to approve Crown Castle's infrastructure deployment plan.

109. The opposition continued. For example, attorneys claiming to represent "the taxpaying residents of Rye" sent a September 6, 2016 letter to the City accusing Crown Castle of misleading the City "into abdicating its lawful responsibilities to review and mitigate the installation of telecommunications equipment," asserting that the "RUA is void, unenforceable, and a nullity," and insisting not only that the City put Crown Castle through inapplicable review (such as through SEQRA) but also that the previously approved Initial Installations be revisited.

110. The City then hired outside counsel (in addition to the City Corporation Counsel) who had never been part of the 2011 Consent Resolution or negotiation of the RUA.

111. Outside counsel's first engagement with Crown Castle was to unreasonably

demand responses to what could best be described as interrogatories and other new, multiple information requests going far beyond any reasonable terms and conditions per the RUA or the City's jurisdiction.

112. Crown Castle, with objections, complied with the requests for information, such as, for example, furnishing the City with a lengthy, detailed September 14, 2016 submission responding to the City's lawyer's inquiries and cataloging how the requests were legally off-base.

113. By way of example, not meant to be exhaustive, the City's outside counsel focused the inquiry on the standards of proof for a carrier to obtain the relief of a reversal of a denial under § 332 of the Communication Act's "Effective Prohibition" standard. That standard had no relationship to the appropriate permitting process applicable to a CPCN holder, under the RUA, under § 253 of the Communications Act, or under any legitimate zoning standards.

114. At each step, Crown Castle advised the City that the scope of the City's inquiries continued to expand beyond any permissible inquiry relevant to its rights, but Crown Castle nevertheless continued to respond, knowing that its only chance of getting to a City Council "approval" was by cooperating to the extent practicable and possible.

115. Crown Castle also continued to extend the Shot Clock deadlines for the City to act on Crown Castle's permitting request, in the hope that the City might eventually be satisfied and agree to finally permit Crown Castle to proceed with expansion of its DAS network.

116. In October 2016, frustrated by the City Council's review process, Crown Castle submitted an alternate plan to the City Manager and City Engineer for deployment of all-conforming equipment as set forth in the RUA, with no new poles (earlier planning had contemplated some new poles) and a reduced node count of 64 pole attachments (so-called "Plan B") which did not rely on any interpretation or amendment of the RUA, a filing the City

procedurally rejected and simply incorporated into the pending City Council proceeding.

117. In furtherance of its efforts to provide information requested as part of the pending City Council proceeding, Crown Castle's counsel then sent the City an October 19, 2016 letter addressed to the City Council's October 5, 2016 determination to conduct SEQRA review as Lead Agency (despite that Crown Castle's application was a Type II action for which SEQRA review could not legally apply) and addressed to the latest information request contained in an October 14, 2016 letter from the City.

118. Crown Castle noted in its October 19, 2016 letter facts demonstrating the City's intent to drag out the process, for example reminding the City that information just requested could have been requested by September 6, 2016 – the date set forth in a tolling agreement previously reached by the parties relative to the City's deadline under the FCC Shot Clock.

119. Despite the City's conduct, Crown Castle indicated in its October 19th correspondence that it was continuing to comply with the City's demands, and in that regard, Crown Castle furnished the City with a full Environmental Assessment Form with exhibits.

120. In addition to obliging requests for information that were irrelevant to the review standards to which the City agreed in the RUA and immaterial to Crown Castle's rights under federal law and as a CPCN holder apart from the RUA consistent with the Consent Resolution, Crown Castle took the opportunity in its October 19, 2016 letter to further advise the City why its actions in executing an ad-hoc review process were contrary to Crown Castle's contractual and legal rights.

121. Crown Castle also noted how it had exhaustively worked with the City to try to tailor its plans to satisfy stated concerns, including by reducing its planned deployment from approximately 85 node locations to 64 node locations with no new poles or structures.

122. The October 19, 2016 submission also provided additional analysis as to why it was improper for the City to employ SEQRA review, explaining that the DEC declared as Type II (and thus exempt from SEQRA) the "extension of utility distribution facilities, including gas, electric, telephone, cable, water and sewer connections to render service in approved subdivisions or in connection with any action on this list." (*Citing* 6 NYCRR part 617.5(c)(11).

123. Crown Castle further noted that § 11.1 of the RUA incorporated this specific Type II exemption for Crown Castle's routine installations of poles and related equipment in the ROW and noted that other actions not contemplated by the RUA could be "unlisted" actions.

124. Crown Castle also explained that the approach it advocated was consistent with the manner in which the City reviewed similarly situated telecommunications and utility companies' installations, and that minutes from proceedings involving such installations in the right of way did not mention SEQRA reviews or even references to SEQRA in such cases, evincing that the City properly treated those reviews of similarly situated utility providers in the ROW as Type II exempt.

125. Crown Castle also pointed out in its October 19, 2016 letter that the DEC handbook specifically notes that "stand-alone facilities constructed specifically for radio or microwave transmission are specifically not included in the exemption for construction on small non-residential structures. However, if a small dish antenna or repeater box is mounted on an existing structure such as a building, radio tower, or tall silo, the action would be Type II." (*Quoting* DEC, *SEQRA Handbook* 33 (3d ed. 2010)).

126. The October 19, 2016, letter also refuted an assertion made by the "taxpayers" counsel in prior correspondence that under the case of *Kaplan v. Village of Pelham*, Index No. 13/3827 (Sup. Ct. Wet. Co. June 20, 2014), the City was obliged to conduct a full zoning

review. Crown Castle noted that *Kaplan* did not address a facial challenge to a municipal permit regime and reserved for possible scrutiny, but did not decide, the issue of whether a municipality's siting law could be applied to a New York CPCN holder under § 253(a) of the Communications Act and New York Transportation Corporations Law § 27.

127. Crown Castle also provided further legal and factual support in its October 19 submission to refute contentions that the project would have any adverse historic impacts, advising that Crown Castle had consulted with state and local agencies on two proposed pole attachment locations in proximity to National Historic Sites/Districts and received reports confirming that the New York State Historic Preservation Officer ("SHPO"), the official charged as a matter of federal and state law with making such determinations, concluded these installations would not have an adverse effect on historic resources pursuant to Section 106 of the National Historic Preservation Act, the National Environmental Protection Act and related FCC regulations.

128. Crown Castle also advised that the SHPO's determinations are dispositive for SEQRA and permitting purposes, citing applicable legal authorities for support.

129. Crown Castle also provided a legal analysis in its October 19 letter explaining how generalized claims of an aesthetic impact do not establish a SEQRA impact that would support a positive declaration, putting aside there should never have been any discretionary review process, and any proper inquiry under the City's Streets and Sidewalks law should have been limited to reviewing traffic or pedestrian safety issues (if any) for a specific pole or location.

130. To provide the City with additional information on this point, Crown Castle furnished a series of photographs for each node location so that each could be evaluated in context.

131. The October 19 letter also noted that property values are not a SEQRA issue and that there are no significant noise impacts from the project. As for the Citizens Group's

invocation of concerns over RF safety, Crown Castle reminded the City that as a matter of federal law, the City may not properly consider this issue, but, to allay any concerns, regardless of whether they were supported, Crown Castle invited the City to contact the FCC Wireless Bureau.

132. Crown Castle also reminded the City in its October 19th submission that to the extent the City was seeking information concerning carriers' technical and operational use of FCC spectrum (which the City sought in an effort to compel Crown Castle to show it could satisfy the Communications Act's Effective Prohibition test), the City does not have jurisdiction over such issues, pursuant to the Second Circuit's decision in *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010) recognizing that such technical matters are exclusively within the FCC's jurisdiction.

133. Lastly, Crown Castle cautioned the City in its October 19th letter that SEQRA could not be used as a delay tactic, and provided the City with precedent on that point.

134. Crown Castle concluded by asking the City to issue a determination of no significance under SEQRA so that the process could move to decision.

135. In or around October 2016, during the same time period that Crown Castle was doing everything it could to furnish responsive information that would allay the concerns of the City and its residents, the City then attempted to terminate the RUA.

136. The City served Crown Castle with a notice declaring Crown Castle to be in "material breach" of the RUA (which would terminate within 45 days of the notice unless cured), in order to create improper leverage against Crown Castle, for the purpose of, on information and belief, cancelling the RUA and forcing Crown Castle to renegotiate the terms and conditions upon which the City would permit access to the ROW.

137. The City's "material breach" claims asserted two issues: (a) that Crown

Castle allegedly failed to review municipal owned alternatives for siting of Crown Castle's nodes; and (b) that Crown Castle's contract with its carrier customer, which permits the carrier customer's ownership of equipment units in the Crown cabinet mounted on the poles, violates the RUA because, according to the City, the RUA does not allow for others' equipment to be installed.

138. As for the first "breach," Crown Castle did in fact conduct a review of City owned sites, and then, at significant time and expense, reengineered the DAS expansion to incorporate a few City owned traffic lights and poles in commercial areas of Rye which were incorporated into a February 2017 filing referred to as "Plan C."

139. The second "breach" claim (like the first) was asserted in bad faith. While the City acted surprised to find that wireless carriers' equipment was being used in connection with Crown Castle's Initial Installations dating back to 2011, the City knew the entire purpose of Crown Castle's deployment, and its federally conferred and CPCN rights, were premised on building infrastructure to provide facilities upon which wireless carriers could transmit their wireless signals, and that it is often the case that the carrier customer owns some of the equipment.

140. The City knew that Crown Castle's systems were designed to transmit wireless carriers' signals, and without the wireless carrier being part of the DAS system plan, Crown Castle's infrastructure, the nodes, and in fact everything Crown Castle sought to deploy, would have no practical use whatsoever.

141. This knowledge is evidenced by the fact that the City had no issue with Crown Castle installing other carrier equipment when the Initial Installations were put into place.

142. This is also why the RUA specifically contemplated that third parties (carriers) would be making use of Crown Castle's facilities. In fact, nowhere in the definition of "Equipment" to be installed under the RUA, nor in Exhibit A to the RUA, which lists examples of

such equipment, was there any requirement that Crown Castle be the owner, nor do the "Examples of typical equipment" listed on Exhibit A limit Crown Castle to only that equipment listed on the Exhibit. Rather, any reasonable interpretation of this provision means that the equipment installed should be similar, even if not identical, to the equipment listed on that Exhibit, regardless of who owns the equipment.

143. Further negating the City's claim that wireless carriers' equipment was not contemplated by the RUA are the purpose clauses embodied in the Recitals on the front page of the RUA. Recital A specifically references that NextG (now Crown Castle) deploys infrastructure for the purpose of "serving NextG's wireless carrier customers."

144. Paragraph 3 of the RUA also acknowledges that the purpose of the agreement is to allow Crown Castle to operate the "Network" and provide "Services." Both of those defined terms in the RUA specifically acknowledge that the infrastructure is to provide services to Crown Castle's wireless customers. The City was well-aware that in connection with providing such services it is frequently the case that wireless customers will pair their equipment and antennas with Crown Castle's infrastructure in order to actually deliver the RF signals that make it possible to furnish wireless services.

145. The City also knew, and always has known, that a DAS system without a carrier's transmission of its signals (which are unique to each carrier), the node system would have no function. To interpret the RUA in a manner that would categorically exclude carrier equipment would be to render Crown Castle's entire infrastructure deployment useless in those instances where carrier equipment is necessary for the operation of the system.

146. The City's bad faith advancement of such interpretation is at odds with the language of the RUA, and with the implied covenant of good faith that New York law requires be

enforced in order to avoid stripping the agreement of any meaning or effect.

147. Moreover, while the City agreed to, and did, repeatedly toll its "cure" period, such that the "cure" period at this point does not expire until May 12, 2017 (after mutually agreed upon extensions), this was a moot point, as there was nothing to cure, such that, in addition to the injunctive and other relief sought herein for the City's violations of Crown Castle's rights under state and federal law, Crown Castle is entitled to a declaration that there was no breach by Crown Castle of the RUA and the City therefore has no right to terminate same.

148. During this same time period when the City sought to terminate the RUA, the opposition campaign essentially evolved into a de facto referendum to pressure the City to vote to deny Crown Castle's application, to challenge the validity of the RUA (if it could not be terminated by the City's allegations of breach), and to pressure the City into considering amending its wireless law – Chapter 196 of its Code – to require full discretionary review for permitting in the City's ROW, despite that every other similarly situated utility provider (cable, electric, fiber providers, landlines) had deployed and would be able to continue to deploy their infrastructure in the ROW unimpeded by this anti-wireless "proprietary" review regime.

149. As of late fall 2016, the City also was also continuing to impose upon Crown Castle the requirement to satisfy the Second Circuit's "Effective Prohibition" test under Section 332(c)(7)(b)(II) of the Communications Act, as articulated in *Sprint Spectrum PCS v. Willoth*, 176 F.3d 630 (2d Cir. 1999) and more recently in *Orange County-Poughkeepsie Ltd. Partnership v. Town of E. Fishkill*, 2015 WL 6875162 (2d Cir. 2015).

150. Although this test was not required by the RUA, the City violated Crown Castle's rights under federal law and as a CPCN holder independent of the RUA, and had no place in any legitimate inquiry relative to deploying equipment in the City's rights of way, the City

continued to give credence to the position that this test needed to be satisfied, such that the application could be denied if Crown Castle did not satisfy a higher burden than that required by the RUA, as well as under state law and § 253 of the Communications Act.

151. The City thus illegally required Crown Castle to demonstrate a gap in coverage, that there are no available alternatives to remedy this gap and that the proposal represented the least intrusive means of remedying the gap.

152. Although Crown Castle's application in any event satisfied this test, the City had no right to use the review process and public's participation as a means to turn the application into a standard-less referendum without reference to applicable criteria or the proper limits of the City's authority, which is limited to reasonable terms and conditions as placed on other utility providers in the ROW and review of safety and pedestrian issues (if any).

153. Notably, as relates to the Effective Prohibition test, the public opposition's plan for a "less intrusive" alternative was for the installation of ten tall communications towers in the City of Rye, instead of the 64 existing utility pole attachments that Crown Castle proposed as of October 2016 (which number was reduced from the 85 proposed as a concession on Crown Castle's part in an effort to do everything it could to work with the City).

154. Ten full-sized towers installed in the City of Rye could not possibly be less intrusive than a series of nodes and utility boxes mounted on poles in the ROW which were designed for, and already hosting, various other types of utility infrastructure. Under Crown Castle's proposal, from the vantage point of the general public, Crown Castle's nodes would be virtually indistinguishable from the existing equipment owned by other utility providers who were not subjected to the discretionary review process forced on Crown Castle by the City.

155. Despite the actions of the City, Crown Castle continued to move forward

with the application process throughout the fall of 2016.

156. On November 28, 2016, Crown Castle submitted to the City updated engineering drawings as a supplement to the full Environmental Assessment Form (which Crown Castle further supplemented on April 19, 2017), additional photosimulations of the proposed installations, and manufacturer specifications for the equipment to be installed, consistent with Crown Castle's determination to provide the City with any data that it reasonably could to try to give the City enough of what it needed to satisfy itself and its constituents that the proposed deployment would be a non-event.

157. However, by this point, the City's continuing insistence that the RUA was subject to termination, and the City's continuing stated plan to amend Chapter 196 and then apply that amendment to put Crown Castle's application through a discretionary wireless zoning review process was certainly cause for concern.

158. Crown Castle also furnished the City with a December 1, 2016 report by a Senior RF Frequency Engineer detailing Crown Castle's radio design criteria, although, like most of the other information sought and provided, such information had no relevance to the City's obligation to issue a municipal permit in the same manner that other applications by similarly situated utility infrastructure providers receive permits.

159. Nevertheless, Crown Castle provided information reiterating technical data, drive tests and coverage information previously supplied to the City in April which was reviewed, but not reported on, by the City's RF engineering consultant who was hired in August 2016.

160. In a further effort to allay concerns, Crown Castle also submitted a real estate appraiser's report which concluded that the pole attachments would have no impact on property values – also a common sense proposition given that one cannot reasonably anticipate

someone would decline to buy a home because the utility pole on his or her street contains utilities.

161. Crown Castle also continued to submit extensive materials into the record responding to, and negating, legal arguments and other concerns raised by public submissions.

162. Moreover, although not legally required, Crown Castle submitted evidence that the Second Circuit's Effective Prohibition test was satisfied by Crown Castle's proposal. The City's RF engineer and outside counsel even publicly verified that there are gaps in coverage and conceded that it was likely that pole attachments in the public ROW would be needed.

163. As of February 2017, Crown Castle was still trying to provide the City with whatever information it could. On February 24, 2017, Crown Castle wrote to the City and summarized where its permit request stood, including Plan C as an alternative.

164. Crown Castle recounted how it had worked with the City to reduce its node plan from 85 to 75 and then to 64 nodes. Crown Castle detailed alternative equipment plans being presented by the City and explained all of the alternatives it evaluated, including with respect to City owned infrastructure (which "cured" that alleged default under the RUA).

165. That letter also summarized the three different options that Crown Castle had presented in total, and highlighted Crown Castle's latest plan (Plan C) as being one that minimizes equipment size and maximizes use of City owned poles, concluding with another request that the City move forward to approve Crown Castle's plans.

166. It appeared by this point that the City, or certain members of the City Council, had prejudged the application, as evidenced by a March 9, 2017 article in the Rye City Review titled "Council poises to reject Crown Castle proposal."

167. The article led off by advising that "Rye City Council members say they plan to reject an amended proposal from the telecom contractor Crown Castle which seeks to

sprinkle new wireless equipment in Rye neighborhoods citywide."

168. The article quoted Councilwoman Danielle Tagger-Epstein as stating "Based on this current plan, I think I would have to do a full environmental impact statement, which we haven't done."

169. This statement evinced a disregard for the fact that Crown Castle's application was a Type II action under SEQRA and for Crown Castle's prior submissions detailing why even if SEQRA applied a negative declaration would be required based on any objective review of the relevant facts.

170. The impetus for the Councilwoman's comments was made clear in the article, which noted that "[i]ssues over Crown Castle have simmered at a steady pace since this past summer when residents flocked to City Council meetings in droves to protest the proposed installation which they fear may adversely impact property values and aesthetics in their neighborhoods." This, notwithstanding the lack of any evidence that property values or aesthetics could be adversely affected by the addition of a few components on each pole, which otherwise houses equipment that is indistinguishable from the vantage point of the public.

171. Crown Castle pressed on, both by supplying additional information (such as a March 10, 2017 letter from Crown Castle's carrier customer emphasizing what should be the proper scope of the City's review and pointing out where the City's procedures ran afoul of that scope), responding to concerns/public comment at an April 5, 2017 hearing, and by trying to continue to engage the City, through discussions with its counsel, in talks aimed at working out the issues, which discussions necessitated four tolling agreement extensions where Crown Castle agreed to extend the Shot Clock deadline for issuance of a determination on its request and the City agreed to extend its Notice to Cure under the RUA, with the Shot Clock deadline having now

expired on April 19, 2017, and the RUA "cure" period being extended to May 12, 2017.

172. Also on the April 5th hearing agenda was the discussion of the City's proposal to amend provisions of its Code aimed at highly regulating Crown Castle to the point of effective prohibition (an impermissible bar to entry under § 253 of the Communications Act, which at this point had already taken place based on the review processes employed), which proposed amendment was taken up again in April 2017 and is discussed in more detail below.

173. Following that hearing, Crown Castle made further record submissions responding to demands for more information outside the legitimate scope of the City's review.

174. On April 7, 2017, Crown Castle's carrier customer submitted coverage maps and additional materials further demonstrating the need for the 64 node design that was now under consideration. This consisted of a further discussion of their need from an RF perspective and scientific data in the form of propagation maps demonstrating where gaps in service and capacity constraints needed to be remedied.

175. Crown Castle further supplemented the record with an April 13, 2017 submission designed to put to rest any lingering questions the City or members of the public had about impacts, including with submissions of visual comparisons and mock installations (through the use of actual mocked up cabinets placed on poles and photosimulation technology) to demonstrate the minimal visual effects of the proposal.

176. Crown Castle also supplied information showing that Crown Castle nodes were in compliance with the City's noise Code, information verifying that Rye is classified as an "urban cluster" with significant population density, and traffic data from the New York State Department of Transportation (as of a 2015 trip count) demonstrating the average vehicle trips per day in areas of the City, ranging from 3,351 daily trips on Grace Church Street to 13,786 on Boston

Post Road to 147,599 trips along the section of I-95 which goes through Rye, evidencing that the range of potential vehicle passengers benefiting from the service ran from thousands to hundreds of thousands per day.

177. The City then held a Special Meeting on April 17, 2017, pursuant to a notice that included a proposed redline of changes to its Code designed to, among other things, effectively and discriminatorily bar Crown Castle's further entry to this market in violation of, *inter alia*, § 253 of the Act.

178. In advance of that meeting, on April 17, Crown Castle wrote to the City to address statements by City officials to the effect that the City would need additional time to consider Crown Castle's permit request, and to memorialize the fact that on April 10th, Crown Castle offered to enter into an additional tolling agreement, which offer was declined.

179. Crown Castle also made clear in its April 17th letter that the City had agreed pursuant to the parties' latest tolling agreement (the fourth) to provide Crown Castle with copies of any reports from the City Planner, City Engineer or City RF Consulting Engineer by no later than April 12th, and Crown Castle confirmed that, as that date had passed and the City elected not to obtain such reports, Crown Castle was not given the opportunity to respond to any such reports, concerning which Crown Castle reserved its rights.

180. The City did not respond, and instead moved forward with its April 17th meeting at which time proposed changes to the City's laws were discussed, included revising the Noise portion of the City's ordinance (Chapter 133) to further regulate placement and noise of telecommunication devices, revising the Streets and Sidewalks law (Chapter 167) to further regulate placement of devices and wireless facilities in the rights of way, and revising the Wireless Telecommunications Facilities law (Chapter 196) to further regulate wireless facilities in a manner

that would, *inter alia*, make the permitting process far more cumbersome and strip Crown Castle of its rights to an administrative review process, violating Crown Castle's rights under the RUA and as a holder of a CPCN under state law, and creating more onerous criteria to satisfy the requirements of a showing of need and that the proposal represents the least intrusive means to fill that need, despite that such inquiry falls well outside any reasonable reading of the City's review authority (cable and electric companies in the ROW are not required to satisfy that test).

181. By the time the April 19th meeting came around, the City had determined to find a way to justify denying Crown Castle its contractual rights to deploy its infrastructure.

182. Within only a few hours before the April 19, 2017 hearing in which Crown Castle expected based on prior meetings that the record would be closed and a decision issued, the City served Crown Castle with what appears to be a hastily drafted letter of the same date from Ronald Graiff, a Radio Frequency Consulting Engineer, to the City's Corporation counsel.

183. The purpose of the letter – to try to negate Crown Castle's showing of need for the DAS system in the ROW – was clear from the first sentence:

> The City of Rye New York, through your office, has requested that the undersigned a New York State Licensed Professional Engineer specializing in Radio Frequency review portions and provide a *second opinion* on the request by [Crown Castle] . . . to construct a 64 Node Distributed Antenna System ("DAS") on existing utility poles in the city. [Emphasis added.]

Crown Castle was surprised to see this submission, not only because it was furnished only hours before what Crown Castle understood was to be the final hearing in violation of the parties' latest tolling agreement by which the City promised to deliver such materials within one week of the hearing date, but also because the letter made clear that this was a *second opinion* sought by the City, when in fact the City had never shared with Crown Castle, or even hinted at the existence of, whatever *first opinion* it had previously received from its initial RF consulting engineer.

184. On information and belief, the City sought this "second opinion" because whatever was contained in the undisclosed first opinion was insufficient to accomplish the City's objective of coming up with some rationale upon which to deny Crown Castle's request.

185. Mr. Graiff's letter attempted to fill whatever gap was left by the first opinion, but this attempt was not successful, as Mr. Graiff's letter made clear that he did not conduct any independent analysis of Crown Castle's proposed plans or the need for the nodes from an RF perspective, such as performing his own propagation map modeling to understand coverage and capacity deficiencies and to determine whether the nodes would remedy those deficiencies.

186. In *lieu* of *evidence*, Mr. Graiff expressed unsupportable assertions casting doubt on the accuracy of data submitted by Crown Castle and its carrier customer.

187. The deficiencies in Mr. Graiff's analysis were encapsulated in an April 21, 2017 responsive letter from Crown Castle's RF Engineer Gregory Sharpe. That letter went through those deficiencies point-by-point, emphasizing the validity of the coverage map evidence, the manner in which portions of the map were coded so as to facilitate analysis of where coverage would be enhanced by the proposal, and providing clarifications of technical RF design requirements and the proper standards for reviewing those requirements.

188. Mr. Sharpe also highlighted the fallacy of Mr. Graiff's suggestion that a weaker signal strength could be utilized to provide wireless services, in response to Mr. Graiff's invocation in his second opinion of wireless frequency standards that apply to "rural settings."

189. Mr. Graiff's use of a standard applicable to "rural settings" ignored that the City is not a rural area laden with flat farmland, but rather an "urban cluster" with a significant population, and an Interstate highway carrying over 140,000 travelers a day.

190. Moreover, by suggesting to the City the signal strength the carrier should

use to provide services, the City's consultant delved into technological preferences – an action which is federally preempted under the previously discussed Second Circuit *Clarkstown* decision.

191. In addition to the submission of Mr. Graiff's second opinion, a few hours before the April 19 meeting, the City also e-mailed to Crown Castle's counsel an undated Memorandum to the Rye City Council from City Staff regarding "Action on Crown Castle's proposal to amend RUA and deploy DAS throughout the City's public right-of-way."

192. This memorandum recommended against issuing a negative SEQRA determination, while acknowledging in that event the City could not legally then act on Crown Castle's permit request (it did anyway, as described below), and listing the grounds, and essentially advocating for, a denial based on grounds that eventually were adopted in the Denial.

193. At the April 19, 2017 meeting, the City then voted to issue a Positive Declaration under SEQRA, making the process subject to a whole new round of mandatory environmental impact review under state law.

194. The City took this measure despite that approximately an entire year of review already had passed while Crown Castle, to its prejudice, complied with the City's shifting demands for information, and that New York law mandates that a SEQRA determination as to a Negative or Positive Declaration (or a finding that the project is SEQRA-exempt which was the required result here) must be made at the earliest stage of a review proceeding – not the very end.

195. The City also ignored existing DEC regulations making clear that a positive declaration, or any substantive SEQRA review, would be legally inappropriate for the type of permitting request made by Crown Castle in this case.

196. The City also ignored that, as Crown Castle advised, the DEC is currently reviewing its general policies of what types of installations would be Type II-exempt, and the DEC

is considering amplifying its policies insofar as these types of equipment installations are concerned, so as to expressly provide that equipment installation projects such as the one proposed by Crown Castle in the rights of way are Type II-exempt.

197. Nevertheless, in a one-page Resolution, the City issued this Positive Declaration, claiming, without support, that there would be "significant adverse impacts" from the proposed deployment based on: 1. "[t]he potential for significant aesthetic/design/visual resource impacts and neighborhood character impacts" (ignoring that Crown's equipment would be virtually indiscernible from any other utility provider's equipment on utility poles, and reflecting an unsupportable position that mounting utilities on a utility pole is contrary to the character of a neighborhood); 2. "[t]he potential for significant impacts related to noise associated with the two and three ion boxes" (the evidence is that there would be little-to-no noise impact); and 3. "[t]he potential for significant impacts to the community character and locally designated historic districts and landmarks" (which also rests on the proposition that a neighborhood would be detrimentally impacted by the mounting of utilities on utility poles and disregards the SHPO's findings – conclusive for SEQRA and permitting purposes – that the proposed installations would not have an adverse effect on historic resources).

198. By its April 19, 2017 SEQRA Determination, the City as a matter of state law could not now legally move forward to a final determination of Crown's permit requests until the environmental impact review process mandated by SEQRA was completed – a process that by its nature would further add months (or more) to what should always have been a quick, run-of-the-mill administrative review.

199. However, by this point, no matter what objections were offered by Crown Castle (including with additional submissions between April 19-22, 2017), there was nothing more

Crown Castle could do to stop the City from blocking Crown Castle's DAS system, as evidenced by the City Council holding a Special Meeting on April 21st in the Mayor's conference room which was noticed as "an attorney/client meeting to discuss confidential matters," and which was then followed by the unusual action the City took at a Saturday April 22, 2017 meeting where Crown Castle's permit request was not on the Agenda (but an "Executive Session on Attorney/Client matters" was), and where, despite the City's failure to conduct any SEQRA review as required by law before a final action could be taken on Crown Castle's request, the City issued the Denial.

200. The Denial consisted of misstatements and erroneous applications of law.

201. A fundamental premise of the Denial was an alleged "substantial question as to the continuing validity of the RUA," presumably based on the City's bad-faith assertion that Crown Castle was in breach of the RUA for the reasons it previously asserted in its notice to "cure" non-existent violations.

202. However, the City ignored that pursuant to its own notice, and several tolling agreements entered into the parties; the time to "cure" had not yet elapsed, which was a condition to the City being able to terminate the RUA, such that the RUA remained valid (and remains so as of the date of this filing) and had not be terminated.

203. The City also claimed, in bad faith, that the RUA only extends to City owned rights of way, as opposed to portions of the right of way owned by the County or private third parties.

204. This assertion is belied by the plain text of the RUA, where on the first page in Paragraph B of the Recitals, the parties acknowledged: "For purpose of operating the Network, NextG wishes to locate, place, attach, install, operate, control, and maintain Equipment in the Public Way (as defined below) on facilities owned by the City, as well as on facilities owned by

third parties herein." The phrase "as well as" means "in addition to" and expressly contemplates the installation of equipment outside of City owned rights of way on facilities owned by third parties, such as private persons and/or the County.

205. The City's bad faith interpretation also defied the spirit of the RUA, which was to streamline the permit process for installations in the rights of way in the same manner in which permit requests for other utility providers in the rights of way were processed.

206. That contention also flouted Crown Castle's rights as a holder of a CPCN which gave Crown Castle the right to situate its infrastructure in the right of way, whether portions of the right of way are City owned or not, and whether the RUA is in effect or not.

207. The City's interpretation is also at odds with the fact that in 2011, the City previously approved Crown Castle's Initial Installations, pursuant only to the RUA and the streamlined permit process the City then employed, notwithstanding that some of the nodes which were previously approved were in public rights of way owned by the County with City Engineer signatures on the County permits.

208. The City's position was inconsistent with the City's own prior precedent, and therefore an illegal position under state law, and it was also arbitrary and capricious, as the issue of who owns which part of the right of way is irrelevant to Crown Castle's right to install its infrastructure in all rights of way in the City (all of which are traveled over by the general public).

209. The City also cast its Denial as non-final, stating that the Denial represented the "action it would take based on Crown Castle's proposal as if the proposed project were exempt from SEQRA."

210. This was an admission by the City that it could not legally deny Crown Castle's application at this stage, having just subjected the process to further and more extensive

SEQRA review. However, the Denial is a final action for purposes of this lawsuit, as the Denial resolution makes clear that regardless of the City's illegal SEQRA determination, the City denied Crown Castle's request on independent bases having nothing to do with SEQRA.

211. The Denial also attempts to justify the City's decision based on the assertion that the proposed equipment did not comply with New York City DoITT equipment standards (which are not legally relevant), and ignored that Crown Castle's 64 node proposal in its Plan B and C submissions included all RUA approved equipment as shown on Exhibit A to the RUA.

212. The Denial also contended that because Crown Castle's plans contemplated Crown Castle's carrier customer placing equipment in Crown's cabinet, it was a breach of the RUA. The City took this position notwithstanding the RUA contemplated that other carriers' equipment would be housed in connection with Crown Castle's infrastructure and that any reading of the RUA which did not allow for same could render the RUA meaningless. Further, the RUA simply fails to require Crown Castle to own every piece of equipment (or any piece, for that matter) required for its installation.

213. The Denial also contended that Crown Castle had not identified nodes that are particularly critical, and that the City did not have a basis for assuming that if some nodes were denied and others approved, the project could not move forward. This claim demonstrated either a fundamental misunderstanding of, or an intentional disregard of, how DAS networks operate.

214. The City then continued to ignore that the RUA governs and tried in the Denial to subject Crown Castle to Chapter 196 of the City Code, which applies only to applications for wireless infrastructure outside of the public rights of way, ignoring Crown Castle's status as a holder of a CPCN as well as § 27 of the State Transportation Corporations Law, which allow for Crown Castle's equipment to be installed in the rights of way.

215. As part of that bad faith tactic, the City claimed in its Denial that Crown Castle did not demonstrate whether there are higher priority locations (or less intrusive locations) for the nodes or a need for the facilities to provide service, relying on "information presented by Ronald Graiff," the consultant whose report was first submitted on April 19th, whose existence in the review process was never disclosed to Crown as part of a fair and open proceeding, and who did not conduct any independent testing to support his "conclusions."

216. The City also claimed that it "relied" on information presented by Crown Castle's carrier customer, although if that were true, its conclusion would have been the opposite, as the carrier customer did demonstrate the need for the facilities.

217. The City also stated it relied on the "public criticizing the Crown Castle analysis," which criticisms cannot legally be substituted for, or relied upon in place of, the only scientific evidence in the record offered by Crown Castle, which proved the need for expansion of Crown Castle's DAS network to serve Rye.

218. The criticisms described by the City are also legally irrelevant, as Crown Castle's permit request could not be subject to Chapter 196 review.

219. That the City did not have such a right is confirmed by the RUA's language. The City tried to get around this fact by including a partial quote of § 3 of the RUA in the Denial:

> Any work performed pursuant to the rights granted under this Use Agreement shall be subject to the reasonable prior review and approval of the City except that it is agreed that no zoning or planning board permit, variance, conditional use permit or site plan permit, or the equivalent under the City's ordinances, codes or laws, shall be required for the installation of [Crown Castle's] equipment installed in the Public Way and/or on Municipal Facilities, unless such a process has been required for the placement of all communications facilities and equipment in the Public Way by all other telecommunications providers . . .

The City's use of ellipses omitted the language at the end of the provision: "including but not limited to the ILEC and local cable provider(s)."

220. This portion of the provision which the City omitted confirms that the City cannot subject Crown Castle to additional review unless it subjected other ILEC and local cable providers to the same review.

221. The City never put other ILEC and local cable providers through such review, but, rather, to the extent the City put them through any review at all, it was akin to the routine administrative review process the City originally employed when Crown Castle made its Initial Installations years ago.

222. The record also contains a March 30, 2017 letter from the cable carrier Altice, a municipal franchisee in the right of way providing broadband and telecommunications services, including Wi-Fi antennas utilizing the same basic RF frequencies as those used for wireless services, exactly like Crown Castle, which letter objected to the proposition contained in draft legislation proposed by the City that franchise agreement holders in the municipal right of way could be subject to zoning review under the City's wireless law (Chapter 196 of its Code).

223. That letter confirmed that Altice's deployment of its technology (including wireless) was subject to its municipal franchise agreement to install utilities in the right of way, and that the scope of the City's review authority was covered by that agreement – which is exactly the case with Crown Castle with respect to its RUA.

224. Citing several legal principles which are directly applicable to Crown Castle, which is to be treated under the RUA like Altice, that letter advised that:

> the exclusion of a franchised cable service provider like Altice from the requirements of the proposed ordinance language would not violate the non-discrimination requirements of Section 253 of the federal Communication Act. That provision generally requires non-discrimination in treatment of telecommunications providers. Here, the core components of the ordinance – oversight, compensation,

> safety/aesthetics, reporting, etc. – are already covered in Altice's franchise.

Altice's situation is on all fours with Crown Castle's. Notably, Altice's franchise with the City does not even include or provide for antennas and WiFi deployments in rights of way.

225. Yet, the City has unreasonably and unfairly discriminated against Crown Castle in violation of the RUA, state law and the Communications Act (§§ 253 and 332) by subjecting Crown Castle to onerous, manufactured review requirements when, on information and belief, based on an examination of responses to FOIL requests, the City not only declined to apply any zoning or other discretionary review to other similarly situated utility providers holding municipal franchises for the rights of way, but the City did not impose any additional review requirements on a cable provider even where the cable provider installed unlicensed Wi-Fi antennas to provide wireless "hot spots" to cable customers, despite that these antennas are functionally equivalent to the antennas that would be used in Crown Castle's DAS system.

226. The City's selective use of ellipses is also demonstrated in the Denial where it partially quotes § 3.1 of the RUA in discussing its review authority, where the City claimed that this portion states:

> The City hereby authorizes and permits [Crown Castle] to . . . install, operate, maintain, control, remove, reattach, reinstall, relocate, and replace Equipment in or on Municipal Facilities . . . A denial of an application for the attachment of Equipment to Municipal Facilities shall not be based upon the size, quantity, shape, color, weight, configuration, or other physical properties of [Crown Castle's] Equipment if the Equipment proposed for such application substantially conforms to one of the approved configurations and the Equipment specifications set forth in Exhibit A.

While the first ellipses omits the phrase "enter upon the Public Way and to locate, place, attach," the second phrase which is omitted after the words "in or on Municipal Facilities" are the words "for the purpose of operating the Network and providing Services."

227. The City recognized the import of that omitted phrase because the defined terms "Network" and "Services" in the RUA contemplate that the purpose of Crown Castle's equipment is to pair with wireless carriers for the purpose of delivering the signals that are used for wireless services, and the City's omission underscores that the City did not want to draw attention to the textual evidence in the RUA that contradicts the City's position that carriers cannot locate their equipment on Crown Castle's utility infrastructure.

228. The City also quoted only part of § 3.3 of the RUA, in support of the position that municipal facilities must be preferred. According to the City's Denial, that provision states:

> Preference for Municipal Facilities. In any situation where [Crown Castle] has a choice of attaching its Equipment to either Municipal Facilities or third-party owned property in the Public Way, [Crown Castle] agrees to attach to the Municipal Facilities . . .

The omitted phrase that follows is "provided that (i) such Municipal Facilities are at least equally suitable functionally for the operation of the Network, and (ii) the rental fee and costs associated with such attachment over the length of the term are equal to or less than the fee or cost to NextG of attaching to the alternative third-party owned property." The use of ellipses to omit this phrase suggested that the obligation to house infrastructure on municipal facilities is absolute and unconditional, when this is not the case.

229. The Denial also claimed that to the extent nodes were to be situated on County or other public rights of way not owned by the City, the RUA did not apply. That contention flouts the text of the RUA (as discussed above) and is at odds with the City's processing of Crown Castle's request for permits for the Initial Installations as well as the fact that, on information and belief, other ILECs and cable providers have never been subjected to zoning or other discretionary review for installations in the right of way regardless of whether such installations were in the public or privately owned parts of the public right of way.

230. The Denial also contends that although the County and City Engineer previously authorized Crown Castle's facilities to be placed in the right of way through a construction application process, that point was "not relevant to the question of whether the nodes can be approved under the RUA," as if Crown Castle's previously approved installations did not involve nodes (which would have rendered Crown Castle's infrastructure useless) and as if the nodes themselves somehow called for separate review than any other piece of infrastructure housed on utility poles, whether belonging to Crown Castle, or the electric or the cable companies, which similarly situated utility providers had never been put through the onerous level of review that the City imposed against Crown Castle.

231. While the City pointed out that the permitting processes for a construction permit and for a land use permit are distinct, the City ignored that the RUA required Crown Castle to be treated no differently than the other utility providers housing equipment on poles, as the City originally did with Crown Castle back in 2011, before the Citizens Group caused the City to yield to public pressure and ignore the boundaries of its lawful authority in this matter.

232. The Denial also claims that the City had a right to conduct more intrusive review than that allowed by the RUA by the City, relying on New York City standards from 2011, and claiming that the proposed equipment did not substantially conform to those standards. However, as a factual matter, the City was incorrect.

233. In each of the alternative proposals considered, and rejected, by the City (*i.e.*, Plan B and Plan C), Crown Castle made clear, either on the face of the proposal itself, or in the course of communications which are part of the public record, that the proposed equipment was in accordance with the equipment standards set forth on Exhibit A to the RUA.

234. While Crown Castle indicated on certain drawings the parameters of a larger

equipment boxes which reflected discussions about the potential size box that the utility poles could hold, Crown did not request that the City approve those larger sizes in Plan B or Plan C.

235. Additionally, although the Denial acknowledged the City was subject to a requirement under § 3 of the RUA to conduct "reasonable prior review and approval," (reflecting Crown Castle's rights under § 253 of the Communications Act and as a CPCN holder independent of the RUA) the City noted "that Section 3 specifically contemplates that the agreement shall not be interpreted to allow Crown Castle to effectively monopolize available space in the rights of way – that it is, it is intended to assure that the rights of way remain available to all."

236. There is no support for this proposition that Crown Castle was seeking to "monopolize" and limit availability of access to utility poles in Rye.

237. The Denial then returned to the irrelevant question of whether the DAS expansion was needed to provide service (not a question the City has ever asked any other utility provider when they installed their equipment) and concluded that there was no such need, relying on Mr. Graiff, but failing to cite to any data in the record based on actual scientific evidence (such as contrary propagation maps) to support that conclusion.

238. The City then suggested, again without scientific proof, that the data submitted does not show that the proposed nodes were sufficient to serve highly trafficked roads, when in fact the data confirmed that the network would remedy coverage and capacity gaps along critical corridors.

239. The City also disregarded the level of daily traffic that passes through the areas in need of service, dismissing the data in the record as not significant.

240. The City also claimed that there "may" be noise issues, despite the record evidence that any noise (if any) would be in compliance with the City's noise ordinance.

241. The Denial also contended that Crown Castle's permit request failed because it did not include any consideration of Municipal Facilities, when the record demonstrated the opposite.

242. The Denial also stated that there "appears to be a substantial contractual dispute between Crown and the City," omitting that this contractual dispute was of the City's own making in an effort to terminate the RUA and compel Crown Castle to start negotiations as to the City's scope of review from the beginning, in violation of Crown Castle's rights under federal law and as a CPCN holder under the New York State Transportation Corporations Law.

243. The City's departure from that contractual and publicly conferred right of Crown Castle to be reviewed in the same manner as other similarly situated utility providers is a violation of the City's duties under the RUA.

244. The City accused Crown Castle of acting "any way it desires," but it is the City, not Crown Castle, that has exhibited such behavior – effectively legislating on the fly to impose requirements on Crown Castle's permit requests that transcend the limitations of the RUA, and transcends the City's own processes and procedures based on the manner in which it previously processed Crown Castle's permit requests and approved the installation of equipment by other providers in the rights of way.

245. The City tried to justify its positions by suggesting in the Denial that in this instance the City had no constraints because its decision making was non-regulatory, and instead the City was acting in its proprietary capacity.

246. Neither the RUA, nor state law, nor federal law, nor the City's authority under its Code, convey the level of discretionary review authority that the City claimed it had the power to exercise in its proprietary capacity, which would only be reserved to that aspect of a

municipal franchise for use of City owned structures as opposed to access to public rights of way.

247. The City also falsely claimed that Crown Castle took the position that any right of review of an application to expand facilities would be preempted under 47 U.S.C. § 1455 (also known as Section 6409 of the Spectrum Act). Crown Castle's position was not that the City would have no right to review an expansion request, but rather the scope of any such inquiry is specifically defined by federal law.

248. In sum, what started out as and what should have been a straightforward process with minimal municipal review required, consistent with the City's historical precedent of allowing Crown Castle to install its original nodes without incident, snowballed into a pitched "us v. them" battle, with the City siding with the Citizens Group in derogation of Crown Castle's contractual, common law and statutory rights to operate under reasonable terms and conditions in the municipal rights of way.

249. The evidence is also clear that in furtherance of its mission to take up the anti-wireless cause, the City set about on a scheme to unlawfully try to terminate Crown's rights under the RUA, and to subject Crown to full zoning and discretionary review under the City's Wireless Facility Siting Law – Chapter 196 of the City Code – which, during the course of the process, the City then sought to amend in order to further impede, if not eliminate, Crown Castle's ability to deploy the node infrastructure for the benefit of its carrier customer, such that a revised Chapter 196 (if it is adopted) would illegally target and prevent Crown Castle from realizing its rights under the RUA and as a holder of a CPCN with rights to the right of way under state law, in addition to its rights under the RUA.

250. Without eliminating the RUA, the City is bound by its provisions, including the provisions in § 3 which specify that, whether Crown Castle installs equipment on municipal

facilities or third party property, the City cannot deny a permit "based upon the size, quantity, shape, color, weight, configuration, or other physical properties of [Crown's] Equipment if the Equipment proposed for such application substantially conforms to one of the approved configurations and the Equipment specifications set forth in Exhibit A," as well as those portions of §§ 3 and 5 of the RUA which confirm that right of way deployments by Crown Castle are not subject to zoning or other land use discretionary permitting requirements that the City might seek to impose, essentially leaving the only permissible scope of the City's inquiry addressed to ensuring that there are no safety issues, such as relates to traffic or pedestrians.

251. On these bases, Crown Castle is entitled to redress under the RUA, and under federal and state law as set forth in the Counts herein, including but not limited to a mandatory injunction directing that all required permits for Crown Castle's deployment of its node plan as set forth in Plan B or Plan C be immediately granted, and a judicial declaration that the RUA was not breached by Crown Castle and therefore remains in full force and effect.

COUNT I
(For Prohibition Of Services, Bar To Entry, And Unreasonable Discrimination)
(For Violation of 47 U.S.C. § 253)

252. Crown Castle incorporates herein by reference all prior allegations set forth herein.

253. 47 U.S.C. § 253(a) provides that "No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

254. Crown Castle has been attempting to exercise its right to access the rights of way located within the City to provide telecommunications services since it first sought a permit from the City for its node deployment plan over a year and a half ago.

255. Crown Castle has been forced to comply with the City's unlawful exercise of discretionary, multi-tiered, illegal discretionary requirements, which have resulted in substantial, unreasonable, and unjustified delay.

256. The Denial and the review processes employed by the City leading up to the Denial obstructs, prevents and bars entry to the deployment of Crown Castle's telecommunications facilities in the City's rights of way, while other similarly situated utility providers in the rights of way have not been subjected to the review procedures and delay tactics employed by the City and have been able to mount their utility infrastructure on poles in the right of way with limited, and on information and belief, at times no review by the City.

257. The City's actions and inaction in response to Crown Castle's attempts to gain access to the rights of way and provide telecommunications services created an unreasonable ongoing delay, which, coupled with the City's Denial of Crown Castle's permit request, and discriminatory treatment against Crown Castle as compared to other utility providers in the right of way that have not been forced to undergo the onerous, ad-hoc processes imposed by the City in connection with its review, has barred entry of Crown Castle's equipment in the right of way and had the effect of prohibiting the ability of Crown Castle to provide telecommunications services in the City in violation of 47 U.S.C. § 253(a).

258. The City's actions and inactions in response to Crown Castle's attempts to exercise its right to access the rights of way wand provide telecommunications services over the course of over a year, and the City's ultimate Denial of Crown Castle's request for a permit to deploy its proposed DAS system, have not been directly related to the City's management of the rights of way, are not competitively neutral and nondiscriminatory, and are not related to the City's imposition of fair, reasonable and lawful requirements, and are, therefore, not within the limited

authority reserved to the City under 47 U.S.C. § 253(c).

259. Crown Castle has suffered and will continue to suffer irreparable harm as a result of the City's unreasonable tactics in delaying Crown Castle's efforts to deploy its infrastructure, forcing Crown Castle into review processes that far exceed the City's lawful jurisdiction and the parties' contractual RUA municipal franchise agreement, and ultimately denying Crown Castle's request for a permit, thereby having the effect of prohibiting Crown Castle from providing telecommunications services and barring entry within the public rights of way.

260. Crown Castle is thus entitled to an order and judgment reversing the Denial and mandating that the City immediately grant Crown Castle's request for a permit and issue all necessary permits and authorizations for Crown Castle to immediately begin the necessary work to deploy its infrastructure in the rights of way and allow for Crown Castle's customers to take whatever actions are necessary to provide wireless services through Crown Castle's infrastructure network.

COUNT II
(Substantial Evidence)
(For Violation of 47 U.S.C. § 332(c)(7)(B)(iii))

261. Crown Castle incorporates herein by reference all prior allegations set forth herein.

262. Section 332(c)(7)(B)(iii) of the Communications Act, as amended by Section 704, provides that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."

263. In violation of this Section, the Denial eschews the actual factual evidence in the record and rests instead on legal argument and standards having no bearing on any legitimate

scope of review, which review should have been limited solely to the level of review employed for other similarly situated utility infrastructure providers who mount pole equipment in the right of way.

264. Crown Castle's request for permits satisfied all such legitimate review requirements, and even under the onerous standards applied by the City, which should not have been applied, Crown Castle demonstrated compliance, evidencing that the City had no grounds upon which to deny the permit sought by Crown Castle in accordance with its rights under the RUA.

265. The substantial evidence in the record did not support the Denial and instead established Crown Castle's entitlement to the permit sought, and the Denial was thus in violation of Section 332(c)(7)(B)(iii) of the Communications Act.

266. Crown Castle is thus entitled to an order and judgment reversing the Denial and mandating that the City immediately grant Crown Castle's request and issue all necessary permits and authorizations for Crown Castle to immediately begin the necessary work to deploy its infrastructure in the rights of way and allow for Crown Castle's customers to take whatever actions are necessary to provide wireless services through Crown Castle's infrastructure network.

COUNT III
(Effective Prohibition)
(For Violation of 47 U.S.C. § 332(c)(7)(B)(i)(II))

267. Crown Castle incorporates herein by reference all prior allegations set forth herein.

268. Section 332(c)(7)(B)(i)(II) of the Communications Act, as amended by Section 704, provides that the "regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . .

. shall not prohibit or have the effect of prohibiting the provision of personal wireless services."

269. In violation of this Section, the Denial effectively prohibits Crown Castle from fulfilling a need for wireless service to existing coverage gaps and to satisfy the wireless capacity needs of the public, including for residences, business and travelers locally and along vital corridors in the area. Crown Castle demonstrated that need and proposed the least intrusive and only viable means of fulfilling that need.

270. Crown Castle is thus entitled to an order and judgment reversing the Denial and mandating that the City immediately grant Crown Castle's request and issue all necessary permits and authorizations for Crown Castle to immediately begin the necessary work to deploy its infrastructure in the rights of way and allow for Crown Castle's customers to take whatever actions are necessary to provide wireless services through Crown Castle's infrastructure network.

COUNT IV
(For Reversal Of The SEQRA Determination and Denial Pursuant To Article 78 Of New York CPLR)

271. Crown Castle incorporates herein by reference all prior allegations set forth herein.

272. The evidence in the record required the approval of Crown Castle's request to deploy its infrastructure in the rights of way and thereby provide the necessary coverage to meet the actual public need for the provision of wireless services in accordance with federal policy.

273. Crown Castle's request for a permit complied with all applicable requirements, as well as those inapplicable requirements foisted upon Crown Castle by the City.

274. The City's SEQRA Determination and Denial was not based on substantial evidence in the record or even on whether Crown Castle complied with the applicable review standards that are applied to other utility providers in the rights of way, nor did the City have any

basis to subject Crown Castle's permit request to SEQRA review, nor did the City have any basis in the record to find that Crown Castle's installations would have any discernible impact upon which to justify a Denial, particularly given that the City's review jurisdiction was limited to only that level of review that would be in accordance with state law and the RUA.

275. The City's SEQRA Determination and Denial of Crown Castle's application was an error of law, arbitrary and capricious and in violation of New York State law, warranting reversal pursuant to Article 78 of the New York CPLR.

276. Crown Castle is thus entitled to an order and judgment reversing the Denial and mandating that the City immediately grant Crown Castle's request for all necessary permits and authorizations for Crown Castle to immediately begin the necessary work to deploy its infrastructure in the rights of way and allow for Crown Castle's customers to take whatever actions are necessary to provide wireless services through Crown Castle's infrastructure network.

COUNT V
(For Breach of Contract)

277. Crown Castle incorporates herein by reference all prior allegations set forth herein.

278. Crown Castle has a valid, existing contract with the City as evidenced by the RUA.

279. The RUA specifies the limited extent to which the City had the right to review any request for Crown Castle to install pre-approved Equipment on utility poles within the City's rights of way.

280. The City breached the RUA by imposing on Crown Castle review requirements beyond those permissible by the RUA, and by denying Crown Castle's request for a permit in violation of Crown Castle's rights under the RUA.

281. As a direct and proximate result of the City's breach of its contract, Crown Castle has been damaged by virtue of the City making Crown Castle unable to deploy its infrastructure in the rights of way, and the City has thus deprived Crown Castle of the benefit of its bargain with respect to the RUA.

282. As a remedy for the City's breach of its contract, Crown Castle is entitled to damages in an amount to be determined at trial, including but not limited to Crown Castle's lost profits and consequential damages, an order and judgment reversing the Denial and mandating that the City immediately grant Crown Castle's request and issue all necessary permits and authorizations for Crown Castle to immediately begin the necessary work to deploy its infrastructure in the rights of way and allow for Crown Castle's customers to take whatever actions are necessary to provide wireless services through Crown Castle's infrastructure network.

COUNT VI
(For Breach of the Implied Covenant of Good Faith and Fair Dealing)

283. Crown Castle incorporates herein by reference all prior allegations set forth herein.

284. Crown Castle has a valid, existing contract with the City as evidenced by the RUA.

285. Implied in the RUA is the covenant of good faith and fair dealing that New York law recognizes is inherent in all contracts, and such covenant, among other things, prohibits a party to a contract from acting in a manner that would subvert the primary purpose of, and deprive the other party of the fruits of, the bargained for exchange which is the subject of the contract.

286. The City breached the implied covenant of good faith and fair dealing by attempting to terminate the RUA based on a specious interpretation advanced by the City to the effect that third party equipment is not permissible on Crown Castle's installations, when the City

knew that such an interpretation would strip Crown Castle of any meaningful benefit under the RUA, because Crown Castle cannot operate its infrastructure to provide wireless services without the presence of wireless carriers' equipment that provides such services.

287. As a direct and proximate result of the City's breach of the implied covenant of good faith and fair dealing, Crown Castle has been damaged by virtue of the City making Crown Castle unable to deploy its infrastructure in the rights of way based on a bad faith, erroneous contract interpretation, and the City has thus deprived Crown Castle of the benefit of its bargain with respect to the RUA.

288. As a remedy for the City's breach of the implied covenant of good faith and fair dealing, Crown Castle is entitled to damages in an amount to be determined at trial, including but not limited to Crown Castle's lost profits and consequential damages, an order and judgment reversing the Denial and mandating that the City immediately grant Crown Castle's request and issue all necessary permits and authorizations for Crown Castle to immediately begin the necessary work to deploy its infrastructure in the rights of way and allow for Crown Castle's customers to take whatever actions are necessary to provide wireless services through Crown Castle's infrastructure network.

COUNT VII
(For Declaratory Judgment)

289. Crown Castle incorporates herein by reference all prior allegations set forth herein.

290. A justiciable controversy exists between the parties, with Crown Castle contending that it has all relevant times been in full compliance with the RUA, that the RUA does not restrict Crown Castle from mounting third party equipment in the rights of way, and that the RUA thus remains in full force and effect.

291. Upon information and belief, the City disagrees with each of the positions articulated in the allegation set forth immediately above.

292. A judicial declaration is thus necessary to resolve the parties' controversy and Crown Castle is entitled to such declaration holding that Crown Castle has all relevant times been in full compliance with the RUA, that the RUA does not restrict Crown Castle from mounting third party equipment in the rights of way, and that the RUA thus remains in full force and effect.

COUNT VIII
(For Violation of New York State Transportation Corporations Law § 27)

293. Crown Castle incorporates herein by reference all prior allegations set forth herein.

294. The RUA's incorporation of an administrative permit process is consistent with Crown's rights under New York State Transportation Corporations Law § 27, which provides that any provider "may erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways and may erect, construct and maintain its necessary stations, plants, equipment or lines upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same . . ."

295. The City's actions in denying Crown Castle's permit request to deploy its infrastructure in the rights of way, by employing processes that are different from similarly situated utility providers having equipment in the rights of way, violates Crown Castle's rights under New York State Transportation Law § 27 and interferes with its CPCN issued by the New York State Public Service Commission.

296. Crown Castle is thus entitled to an order and judgment reversing the Denial and mandating that the City immediately grant Crown Castle's request and issue all necessary permits and authorizations for Crown Castle to immediately begin the necessary work to deploy

its infrastructure in the rights of way and allow for Crown Castle's customers to take whatever actions are necessary to provide wireless services through Crown Castle's infrastructure network.

WHEREFORE, Crown Castle respectfully demands judgment of this Court on the Counts set forth above as follows:

1. On the First Count, an order and judgment reversing the Denial and mandating that the City immediately grant Crown Castle's request and issue all necessary permits and authorizations for Crown Castle to immediately begin the necessary work to deploy its infrastructure in the rights of way and allow for Crown Castle's customers to take whatever actions are necessary to provide wireless services through Crown Castle's infrastructure network.

2. On the Second Count, an order and judgment reversing the Denial and mandating that the City immediately grant Crown Castle's request and issue all necessary permits and authorizations for Crown Castle to immediately begin the necessary work to deploy its infrastructure in the rights of way and allow for Crown Castle's customers to take whatever actions are necessary to provide wireless services through Crown Castle's infrastructure network.

3. On the Third Count, an order and judgment reversing the Denial and mandating that the City immediately grant Crown Castle's request and issue all necessary permits and authorizations for Crown Castle to immediately begin the necessary work to deploy its infrastructure in the rights of way and allow for Crown Castle's customers to take whatever actions are necessary to provide wireless services through Crown Castle's infrastructure network.

4. On the Fourth Count, an order and judgment reversing the Denial and mandating that the City immediately grant Crown Castle's request and issue all necessary permits and authorizations for Crown Castle to immediately begin the necessary work to deploy its infrastructure in the rights of way and allow for Crown Castle's customers to take whatever actions

are necessary to provide wireless services through Crown Castle's infrastructure network.

5. On the Fifth Count, damages in an amount to be determined at trial, including but not limited to Crown Castle's lost profits and consequential damages, an order and judgment reversing the Denial and mandating that the City immediately grant Crown Castle's request and issue all necessary permits and authorizations for Crown Castle to immediately begin the necessary work to deploy its infrastructure in the rights of way and allow for Crown Castle's customers to take whatever actions are necessary to provide wireless services through Crown Castle's infrastructure network.

6. On the Sixth Count, damages in an amount to be determined at trial, including but not limited to Crown Castle's lost profits and consequential damages, an order and judgment reversing the Denial and mandating that the City immediately grant Crown Castle's request and issue all necessary permits and authorizations for Crown Castle to immediately begin the necessary work to deploy its infrastructure in the rights of way and allow for Crown Castle's customers to take whatever actions are necessary to provide wireless services through Crown Castle's infrastructure network.

7. On the Seventh Count, a judicial declaration holding that Crown Castle has all relevant times been in full compliance with the RUA, that the RUA does not restrict Crown Castle from mounting third party equipment in the rights of way, and that the RUA thus remains in full force and effect.

8. On the Eighth Count, an order and judgment reversing the Denial and mandating that the City immediately grant Crown Castle's request and issue all necessary permits and authorizations for Crown Castle to immediately begin the necessary work to deploy its infrastructure in the rights of way and allow for Crown Castle's customers to take whatever actions

are necessary to provide wireless services through Crown Castle's infrastructure network.

9. On all Counts, Crown Castle's costs, expenses, and attorneys' fees, and any and all other damages and interest to which Crown Castle is lawfully entitled, together with such other and further relief as the Court deems just and proper.

Dated: White Plains, New York
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